

# AIRGRAM

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ANALYSIS & DISTRIBUTION  
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FROM : Amembassy ASUNCION

DATE: April 20, 1966

SUBJECT : Latest Brazilian Note on Guairá

REF : EmbA-335, Rio Tel 2132 to Dept., Embtel 366, Emb A-397

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## I. INTRODUCTION

The latest Brazilian note on Guairá, note No. 92 dated March 25, 1966, replies in some detail to the Paraguayan note No. 712 of December 14, 1965. Rio's tel 2132 to the Department, No. 73 to Asuncion, summarized the main points. The Brazilians obviously devoted a good deal of time to the note's preparation. Although they took a hard line, it is well written and carefully documented. Following is an analysis of this note with emphasis on new arguments or important clarifications presented and on possible Paraguayan counter-arguments to the principal points therein. It is assumed that the reader is already familiar with the points at issue. The above-referenced A-335 provides further background, and the Spanish text of the note was submitted with A-397.

## II. ANALYSIS OF THE NOTE

### A. Argument that boundary already demarcated

Paragraph 15 of the note provides a useful list of the documents from the period 1872-74 upon which the Brazilians base their argument that the boundary has been established since 1874. Paragraphs 21-23 indicate that the demarcation of 1872-74 was reaffirmed by the Treaty of 1927, which its very title describes as "complementary to the treaty of 1872." But since the 1927 Treaty had nothing to do with the boundary in question, the argument here is essentially a negative one: i.e. that the 1927 Treaty raises no question (en nada pone en cuestion) concerning the validity of the earlier border treaty. Finally, the Brazilians state that the 1930 Protocol establishing a new Border Commission, as well as the actual work of the Commission, does not reopen the demarcation of the border in the Guairá area but merely provides for more detailed "characterization" of the border already established. Article 10 of the Protocol, quoted in Paragraph 32 of the note, is the principal documentary support for this position.

Although these sections of the Brazilian note array impressive documentary evidence to substantiate its position that the location of the border is already established, the fact remains that the new Border Commission has been empowered to make a more definitive determination of the boundary in the Guairá area. To argue whether this power amounts to demarcation or "characterization" is in large part to debate a minor semantic point. The Brazilians themselves in Paragraph 59 of their note admit that "characterization" may be commonly deemed "demarcation." The more important question is how precise are the guidelines of 1872-74 and how closely has the new Border Commission actually followed them.

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This question of how closely the new Commission has followed the 1872-74 guidelines warrants a separate paragraph. Brazil concedes in the ninth section under Paragraph 51 that certain alterations in the boundary were made by a "Conditional Agreement" when the conventionally accepted boundary along the Amambay mountains south to Mbaracayú was found to differ from the demarcated boundary. Although the "conventionally-accepted" yardstick might not favor the Paraguayans at Guairá, the very fact that a yardstick was established which allowed deviations from the previous demarcation could be used to buttress the Paraguayan case against regarding the work of 1872-74 as controlling. A further weakness in the Brazilian position appears in Paragraphs 54 and 55. Here the Brazilians argue that the various points measured by the Commission in 1962 and 1963, measurements which became the basis for the Paraguayan claim to establish the boundary further north, were "purely of a topographical nature" and "in consideration of the cordiality" which Brazil wished to maintain with Paraguay. Nevertheless, the Brazilians were surely aware of the reasons behind the GOP's desire to make these measurements, despite what may have been written into the Act of the 25th Conference (copy unfortunately unavailable), and the fact that they finally agreed to such brings into question their contention that the border at Guairá was clearly established in 1874.

B. Arguments as to boundary details

Our A-335, especially page 5 on "Do the falls themselves belong to Brazil?", raised various questions concerning the details of the boundary at the falls. The latest Brazilian note makes a few noteworthy comments in this regard, though it does not really clear up the ambiguities involved. One question which the Brazilians discuss in more detail than previously is the precise location of the border's eastern extremity. In Paragraph 87 especially, they help to clarify their position as to whether the border stops at the right bank of the Paraná or goes on to the channel of the river itself. They concede that the border should extend into the river, though this point is labeled "imaginary." Perhaps because they regard this point as imaginary, they seem to return to the right bank in other parts of the note as the effective boundary.

Another item worth mentioning is that the GOB appears to concede in Paragraph 90 of the note the Paraguayan argument that the words "Salto Grande" in the treaty cannot be automatically translated as "Fifth Fall." This concession may well be unwitting since the Brazilians in the paragraph are not actually discussing this specific point. They are rather simply attempting to explain why the Border Commissioners did not refer to the Fifth Fall when they arrived at the Paraná in March 1874. But by stating in the paragraph that the Commissioners could not refer to the Fifth Fall until after a survey had been made, the Brazilians seem to support the Paraguayan case against deriving "Fifth Fall" purely from the treaty.

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At the end of the note, beginning with Paragraph 137, the GOB returns briefly to the details of the border. Their discussion of the landholdings and the road in the disputed area is of interest, as are the references to maps in Paragraphs 142-145. The comments on the "observation pillar" in Paragraphs 139 and 140, however, add nothing new.

The Paraguayans could, of course, find counter-arguments to the various Brazilian arguments on boundary details. Some of them are mentioned in A-335. The most important one, however, is their contention that the treaty actually requires a new line further to the north.

C. Does a treaty take precedence?

Although the GOB note leads one to be increasingly sure that the acts and maps of the 1872-74 Border Commission have ambiguities in their own right, the Paraguayans have preferred for obvious reasons to turn to the treaty itself to support their claim to the northern ridge as the rightful frontier. The Brazilians do not really face this question in their note head-on. In Paragraph 107 they argue that borders cannot be left indefinitely open to modifications on the basis of scientific studies; and in the following paragraph they quote the International Court to the effect that a treaty cannot be left open to modification "every time that an inexactitude is discovered" in its application. But the question at hand is a special case. It is not a matter of leaving a treaty open to an indefinite number of modifications, but rather one in which the establishment of a border has been specifically opened to further "characterization." Although such characterization was to be done in keeping with the treaty and with the work of the first Border Commission, no specific guidance is offered in the Protocol as to which to follow when an inexactitude is discovered. The question of the primacy of the treaty, therefore, remains unanswered, or ineffectively answered, by the GOB note.

D. Validity of the GOP case for the northern ridge?

In answer to "C" above, the Brazilians would probably counter that the whole matter is academic since the inexactitude in question is invalidated by the points raised in Paragraphs 112-129 of their note. The Brazilians elaborate in these paragraphs an interesting argument concerning the "principal mass" and the "watershed" of the Mbaracayú.

Paragraphs 117-119 of the note outline the case as to the "principal mass." According to these paragraphs, the principal mass of the Mbaracayú near the falls is neither the northern nor the southern of the ridges in dispute but rather another ridge still further to the south which runs into the Piraty River. The two ridges in dispute are thus "spurs" of the more southern ridge which, being the principal mass, is the true "northern range" of the Mbaracayú (northern in the sense that a still more southerly range takes off from Ybycuí, where the Mbaracayú mountains begin). However, since the principal mass and the northernmost spur hit the Paraná River below and above the falls

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respectively, the middle ridge, which takes off from the principal mass and hits the falls at the Fifth Fall, is more appropriate for the border in the Brazilians' point of view. In addition, both the northernmost spur and the principal mass end in a marsh (bañado), while the middle ridge forms a watershed. Paragraph 126 of the note stresses the importance of this point and cites the same article of the 1872 Treaty which the Paraguayans use to support their argument for following the highest ridge.

The argument outlined above leads the Brazilians to make four points in Paragraphs 121 and 124 in defense of the ridge to the Fifth Fall as the only possible border: 1) it forms a watershed, 2) it hits the river at the falls, 3) it is part of the principal mass of the Mbaracayú, and 4) it contributes to the actual formation of the falls. But these points, while presented with some care, are not completely convincing. Although the middle ridge may form a watershed, it is not clear from the treaty that this is necessary to establish the boundary. The portion of the treaty quoted by the Brazilians says merely that "all of the watersheds or slopes (vertientes) which run to the north and east pertain to Brazil, and those which run to the south and west pertain to Paraguay." This statement does not say specifically that the border must follow the watershed. It is also tossed in at the end of the first article rather than directly qualifying the more explicit stipulation that the boundary follows the summit (cumbre) of the Mbaracayú. The second point, that of where the ridge hits the falls, is likewise unconvincing, unless one takes "Salto Grande" to mean Fifth Fall, which may be difficult to justify after the Brazilian statements in Paragraph 90 quoted under "B" above. Although the northern ridge does not terminate at the major falls, it does reach what could be deemed the upper limits or the beginnings of the falls, taken as a whole. Point number 3, in turn, is the weakest of them all. Since the Brazilians have already argued that the principal mass lies to the south, which in itself may be open to question, they have to admit that the northern ridge and the middle ridge are both spurs. The only difference between the two would seem to be that the middle ridge takes off from the "principal mass" in a more southerly direction.

The fourth point deserves some elaboration. Paragraph 121, point 3, presents the argument to the effect that, since erosion would work upstream, mountains actually contributing to the formation of a waterfall would have to lie either at the falls or slightly before, never above. The more basic question of why the mountains need contribute to the formation of the falls to serve as the boundary is not discussed. In addition, one could question the point's validity on purely geographic grounds. Since a waterfall occurs when the ground level becomes suddenly lower, it would seem reasonable to suggest that the principal mass and highest points of land contributing to the falls would more likely lie above them than below.

#### E. GOB proposals for the future

At the end of the note the GOB turns to the future. It first attempts to reply to the Paraguayan charge that their delays have hindered the completion of the work of the Border Commission. Although much of their commentary involves a

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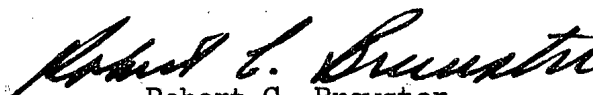
list of Paraguayan maneuvers which delayed a meeting of the Commission in 1961, the GOB does express in Paragraph 136 its willingness to re-activate the Commission's work, provided it follows "strictly" the 1930 Protocol. In Paragraph 131, the GOB also offers a proposal for consideration by the Commission, namely that it attempt to define the terminal point of the watershed of the Mbaracayú at the falls. Neither of these approaches, however, offers much leeway for future negotiations.

A more interesting GOB proposal is that an effort be made by the two governments to forget "sterile conflicts" and to work jointly to achieve the "integral" development of the resources of the Paraná. This proposal is noteworthy in that it envisages not only the development of the hydroelectric potential of the Paraná but of its agricultural and navigational potential as well. Although no specific mention is made, perhaps intentionally, of Paraguayan rights to participate in the development of the river at the falls, the proposal seems genuine and may indeed open an "auspicious line" for future negotiations. This closing accent on the positive is tarnished, however, by the firm GOB attitude in Paragraph 150 against removing its troops from the area, a gesture which the Paraguayans have long stated must precede any substantive talks.

### III. CONCLUDING SUMMARY

On the basic points at issue, the GOB note raises as many questions as it answers. In defense of its claim that the boundary has already been established, Brazil attempts to make a distinction between "demarcation" and "characterization." But it is still unclear whether, in characterizing a border, the work of the 1872-74 Border Commission should be controlling if inconsistencies with the basic treaty are discovered. In addition, despite the geographic arguments, the Brazilians have not really countered the Paraguayan claim that the highest ridge is the northern. The watershed argument is the strongest in this regard, but it is by no means clear-cut. Brazilian proposals for the future similarly do little to resolve the basic stalemate between the two sides. Although the suggested integral development of the Paraná is interesting, the problems of the troops and the border itself remain.

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